



Date: March 30, 1998
Case No.: 96-INA-357

In the Matter of:

NAN YA LAMINATES, INC.,
Employer,

On Behalf of:

FANG-MEI CHO,
Alien.

Appearance: Daniel H. Blume, Esq.
for Employer and Alien

Before: Holmes, Jarvis and Vittone
Administrative Law Judge

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification¹ by a Wholesale Electronic Materials company for the position of Systems Analyst (AF 46-47).² The Certifying Officer ("CO") issued a Final Determination ("FD") denying certification on the ground, *inter alia*, that Employer failed to document timely contact of a U.S. applicant (AF 7-8).

In the Notice of Findings ("NOF") issued on July 17, 1995, the CO proposed to deny the application on the grounds that the job requirement of a master's degree appears to be unduly restrictive in violation of 656.21(b)(2)(i)(A); that eight U.S. applicants were apparently rejected for other than lawful, job-related reasons in violation of 656.24(b)(ii)(ii); and that one of the U.S. applicants, Li Peng, may not have been timely contacted in violation of 656.21(b)(6) and

¹Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. Unless otherwise indicated, all references to regulations can be found in Title 20. References to the Appeal File are designated "AF".

²"AF" is an abbreviation for "Appeal File."

656.20(c)(8). (AF 40-44). Employer submitted timely rebuttal (AF 9-39). The rebuttal included a four page letter signed by the President, Wee B. Aw, explaining the necessity for the master's degree and experience requirement and setting forth the reasons for rejecting each of the U.S. applicants in question. The rebuttal does not attempt to explain the alleged untimely contact of U.S. applicant Peng. The only reason given by Employer in rebuttal for rejecting applicant Peng was that applicant Peng was only interested in working as a consultant or on a project basis (AF 11).

DISCUSSION

The regulations provide that an employer's rebuttal evidence must rebut all of the findings in the NOF, and that all findings not rebutted shall be deemed admitted. §656.25(e); ***Belha Corp.***, 88-INA-24 (May 5, 1989) (*en banc*); ***Our Lady of Guadalupe School***, 88-INA-313 (June 2, 1989). Failure to address a deficiency noted in the NOF supports a denial of labor certification. ***Reliable Mortgage Consultants***, 92-INA-321 (Aug. 4, 1993).

The advertisement for this position was posted in the San Jose Mercury News from January 5, until January 7, 1994, and ten U.S. applicants responded (AF 119-121). The only evidence that Employer contacted the applicants are copies of a letter signed by Jason Aw, Manager. These letters each state

Thank you for sending us your resume. We have carefully reviewed your qualifications for the System Analyst position. Although your qualifications do not meet the requirements of the position, we thank you for your interest in employment with our company and wish you every success in your professional career.

(AF 80-89). Seven of the letters are dated February 10, 1994, while the remaining three are dated March 10, 1994. The letter to applicant Peng was dated March 10.

It has been held that an employer must make efforts to contact qualified U.S. applicants in a **timely** manner after receipt of resumes and that its failure to do so indicates a failure to recruit in good faith and may result in a denial of labor certification. ***Loma Linda Foods, Inc.***, 89-INA-289 (Nov. 26, 1991) (*en banc*). Employer's application for labor certification sets forth the requirements for the position (AF 46-47). One of those requirements is a master's degree in computer science and one of the reasons noted by Employer for rejecting applicant Peng in its results of recruitment report, is that applicant Peng does not have a master's degree (AF 91). However, applicant Peng's resume clearly indicates that he does possess a master of science degree (AF 105).³ Applicant Peng responded to an advertisement placed between January 5 and

³Even though the CO found the requirement of a master's degree to be unduly restrictive, for the purposes of this analysis, such a finding is irrelevant because rejection of a U.S. applicant who qualifies under the unduly restrictive requirements of Employer, constitutes unlawful

January 7, 1994, and the only documented evidence that Employer attempted to contact applicant Peng is by a letter dated March 10, 1994 (2 months after the advertisement of the position).

After thoroughly reviewing the record, we find that applicant Peng was potentially qualified for the position and there is no evidence that indicates that Employer attempted to contact U.S. applicant Peng until two months after the placement of the classified advertisement. *Rancho Liquor*, 90-INA-520 (Dec. 3, 1991) (delay of 21 days is too long to review seven resumes and contact four applicants); *Hydromach*, 89-INA-329 (Aug. 15, 1990) (30-day delay, no explanation). Further, Employer does not rebut the CO's finding in the NOF of untimely contact of U.S. applicant Peng. Certification was properly denied because Employer failed to rebut the CO's finding that applicant Peng was not contacted in a timely manner. See *Sousa & Faria, Inc.*, 94-INA-426 (Oct. 3, 1995). Accordingly, the following Order shall enter.

ORDER

The Certifying Officer's denial of alien labor certification is hereby **AFFIRMED**.

SO ORDERED.

for the panel:

JOHN M. VITTON
Chief Administrative Law Judge

Judge Holmes, dissenting.

I respectfully dissent. The majority by focusing on the issue of contact with Mr. Peng as the sole basis for affirming the CO's denial of labor certification, ignores the 30 pages of rebuttal furnished by Employer dealing with, primarily the issues of business necessity and whether the job opportunity was full time. In that connection Employer, by its President, furnished information demonstrating it was a \$4.7 million corporation, subsidiary of one of the world's largest producers of printed circuit fabrication materials. It further demonstrated the business necessity of a Master Degree in Computer Science. In so doing, Employer, in my opinion, successfully rebutted the CO's NOF on these issues. Employer prior to the NOF, on March 10, 1994, explained that even though the applicants including Mr. Peng were not qualified because they didn't have the educational experience, they were contacted within two weeks. Mr. Peng, according to Employer, was not interested because he requests a salary of \$40.00 per hour on a project or consulting basis. (AF-91) Employer, again, in its rebuttal stated that: "During the interview Leo Peng made it clear that he would like to work only as a consultant or on a project basis. He had developed a simple accounting software and was more interested to sell his software

rejection.

than to be hired in a full time position.” (AF-11) Employer has thus furnished specific information which would appear to be obtainable only by an interview. Employer has thus made a *prima facie* case that it did contact Mr. Peng in a timely fashion, although no specific proof was made of the contact, such as telephone logs.

Under the circumstances, I would remand to the CO with instructions that a follow up questionnaire be furnished of Mr. Peng to determine whether or not he was contacted by Employer as alleged, and/or Employer furnish additional information such as telephone logs or other proof that an actual interview took place. While it is Employer’s burden to rebut the CO’s findings, requests for documentation must be reasonable and alternative proffers of rebuttal accepted by the CO where warranted.

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.